IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/01/2004

CORAM

THE HONOURABLE MR. JUSTICE V.KANAKARAJ

Second Appeal No.801 of 2000

Basappa .. Appellant/
Plaintiff

-Vs-

Basamma .. Respondent/
Defendant

Second Appeal preferred under Section 100 C.P.C. against the judgment and decree dated 12.2.1999 made in A.S. No.85 of 1998 on the file of Principal District Judge, Dharmapuri at Krishnagiri, thereby reversing the judgment and decree dated 18.8.1996 made in O.S. No.339 of 19 96 on the file of Subordinate Judge, Hosur.

!For appellant : Mr. C.R. Muralidharan

^For respondent : No appearance

:J U D G M E N T

Appellant, who is the plaintiff, has filed the suit in O.S.No.399 of 1996 on the file of the Court of Subordinate Judge, Hosur, for the relief of specific performance and permanent injunction on averments such as that the suit property belongs to the respondent/defendant and he agreed to sell the suit property to the plaintiff for a sum of Rs.43,375/-; that after receiving a sum of Rs.36,325/- as advance, the defendant executed an agreement of sale on 10.7.1995, as per which, the plaintiff has to pay the balance of Rs.7,050/- within a period of three months, on receipt of which, the defendant has to execute the sale deed; that the plaintiff was always ready and willing to perform his part of the contract; that on coming to know that the defendant decided to sell the property to her sister Krishnamma, the plaintiff sent a notice on 22.7.1995; that on receipt of the said notice, the defendant sent a reply containing false allegations. On such averments, the plaintiff has filed the suit for the relief extracted supra.

2. The defendant filed the written statement contending that the suit is not maintainable; that she is the co-owner of the property; that the allegation that the defendant is the absolute owner of the suit property is not correct; that both the defendant and her sister Krishnamma are entitled to the suit property; that the properties are in joint possession and

enjoyment of the defendant and her sister; that there is no agreement of sale entered into between the defendant and the plaintiff on 10.7.1995; that the alleged agreement of sale is a forged one; that there is no necessity on her part to sell the property and that her sister is not a party to the agreement and that patta stands in the name of the defendant and her sister. On such pleadings, the defendant has prayed to dismiss the suit with costs.

3. Before the trial Court, on the side of the plaintiff, P.Ws.1 to 3 were examined and Exs. P.1 to P.3 were marked. On the side of the defendant, besides examining herself as D.W.1, she would also mark the settlement dated dated 13.2.1993 as Ex.D.1. The trial Court, on the pleadings of parties, would frame the following issues for consideration of all questions involved in the suit:-

1. Whether the plaintiff is entitled to the relief of specific performance as prayed for? 2. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for? 3. Whether the agreement of sale dated 10.7.1995 is true? 4. Whether the suit property is the individual property of the defendant? 5. To what relief the plaintiff is entitled?

4. Considering the oral and documentary evidence, the trial Court has decreed the suit with costs regarding the relief of specific performance, but dismissed the suit as regards the relief of permanent injunction. Aggrieved by that, the defendant has preferred A.S. No.85/19 98 on the file of the Court of Principal District Judge, Dharmapuri at Krishnagiri. The said lower appellate Court has framed the following points for consideration:

1. Whether the appeal is maintainable? 2. Whether the plaintiff is entitled to the relief of specific performance?

5. The lower appellate Court, on appreciating the evidence both oral and documentary, came to the conclusion that the alleged agreement of sale is not a true one and therefore, the plaintiff is not entitled to the relief of specific performance. Holding so, the lower appellate Court dismissed the appeal, reversing the judgment and decree granted by the trial Court. Aggrieved by that, the plaintiff has filed the present Second Appeal on grounds such as brought forth in the memorandum of second appeal.

6. Since the above second appeal has not been admitted, there had been no occasion for the Court to frame the substantial question of law, and therefore, it has become necessary on the part of this Court to frame the substantial question of law and hear the arguments of the parties. The vital substantial question of law that arises from out of those suggested on the part of the appellant for determination of the questions involved in the second appeal is:-

"Whether the lower appellate court is right in holding that Ex.A.1 agreement

of sale is a fraudulent and concocted document and whether the lower appellate court had failed to consider that having established the due execution of Ex.A.1 agreement of sale for a proper and valid consideration, the plaintiff is entitled to the equitable relief of specific performance of the contract?

7. During arguments, the learned counsel appearing on behalf of the appellant, besides dwelling, for most part of the arguments, on facts and circumstances encircling the case of the appellant, would cite two judgments in support of the case of the appellant respectively reported in (i) 1993 II MLJ 144 (Kumarasamy v. S.K.John (died) and (ii) 1996-2-L.W. 836 (Mohamed Akbar Batcha Sahib v. Y.Nagarajan). The first judgment cited above is a Division Bench judgment of this Court wherein, while deciding on the particular aspect of the doctrine of mutuality, it has clarified the ambiguity inertia that might be entertained by parties in the context of an agreement mutually entered into, in the following language:-

"The doctrine of mutuality means that the contract should be mutually enforceable by each party against the other and not that right for right, there must be corresponding clause. A contract may contain a series of clauses and covenants which form the total bargain each of which is a consideration for the other. Mutuality does not mean equality and exact arithmetical correspondence. It means that each party must have the freedom to enforce rights under the contract against the other. The Specific Relief Act does not anywhere repudiate the doctrine of mutuality. So mutuality means that each party must have the freedom to enforce the rights under the contract against the other. But under Sec.20(4) of the Specific Relief Act the court shall not refuse to any party specific performance of the contract merely on the ground that the contract is not enforceable at the instance of the other party."

The second judgment cited above is also a Division Bench judgment of this Court on the point of molding the relief in suits of specific performance, wherein it is held:-

"the judgment and decree passed by the learned Judge of this Court are based on equitable considerations and the suit being one for specific performance, he was well within his rights for having exercised his power under Order 7, Rule 7 C.P.C. and moulded the relief. The context in which the recital in the agreement is found, shows that the defendant has made a representation to the plaintiff that he had a power of Attorney in his favour authorising him to sell the property to the plaintiff."

8. On the part of the respondent, since no appearance has been shown or any representation made on his part, in spite of a reasonable opportunity being afforded, this Court is left with no choice but to decide the above case on merits and in accordance with law in consideration of the facts and circumstances as pleaded and the evidence placed on record and upon hearing the learned counsel for the appellant.

9. This is a case filed by the appellant praying for specific

performance of Ex.A.1 suit agreement dated 10.7.1995, regarding which, the appellant would come forward to plead in his plaint that having fixed the sale consideration at Rs.43,375/-, the appellant having advanced a sum of Rs.36,325/- on the date of agreement itself; that the respondent/defendant agreed to do the registration of the sale deed in three months thereafter on payment of the balance sale consideration of Rs.7,050/= by the appellant, but in spite of the appellant having been ready and willing to pay the balance consideration and get the sale deed registered in his name, since the defendant did not come forward to do the same, having issued Ex.A.2 notice demanding performance of the contract on the part of the defendant for which, the defendant issued a false reply in Ex.A.3, and therefore, praying for specific performance and permanent injunction against alienation of the suit property in favour of any third party, the appellant had filed the suit in the Court of Subordinate Judge, Hosur, in O.S.No.339 of 1996.

10. The above contentions of the appellant/ plaintiff would be vehemently denied on the part of the respondent/defendant stating that the suit property is not independently belonging to the respondent, but another Krishnamma as the co-owner and they both are in possession and enjoyment of the same without any deviation among themselves; that there had been no such agreement ever entered into, much less as it has been shown under Ex.A.1 dated 10.7.1995, not is it incumbent on her part to do the registration on receipt of the sum of Rs.7,050/=; that Ex.A.1 is a manipulated, made-believe and a concocted document with which, absolutely no truth is attached to and hence praying to dismiss the suit with costs.

11. The trial court, having framed five issues including that of whether the agreement dated 10.7.1995 is a manipulated and made up document and would permit the parties to record evidence, during which, on the part of the plaintiff, besides examining himself as P.W.1, would also examine two more witnesses as P.Ws.2 and 3. For documentary evidence, it is Exs.A.1 to A.3 mentioned above which would be marked on the part of the plaintiff. In retaliation, the respondent/ defendant would examine herself as the sole witness as D.W.1 on her side, besides marking one document as Ex.B.1 viz., a gift settlement deed 13.2.1993 given in her favour by one Chinnamuni Chennamma.

12. In consideration of these evidence placed on record and appreciating the same in the context of the facts and circumstances pleaded by parties, the trial court would ultimately arrive at the conclusion to hold that the plaintiff was entitled to specific performance of half of the properties owned by the defendant, the respondent herein, from out of the whole, on receipt of the balance consideration of Rs.7,050/=, further deciding in the circumstances that there is no necessity for any injunction to be passed, thus giving a time of two months for performance.

13. Aggrieved, an appeal had been preferred in A.S.No.85 of 1998 by the respondent/defendant on the file of the Court of District Judge, Dharmapuri at Krishnagiri and the learned Judge, having traced the facts and circumstances as pleaded before the trial court and framing its own points for consideration and having its own discussions on the evidence placed on record

before the lower court, would find that Ex.A.1 has been prepared by manipulation and fraud and that no truth could be attached to the said document, which came to be proved from the evidence of P.Ws.1 and 2 and D.W.1 and mor eover, there is no necessity on the part of the plaintiff to have stated that the balance consideration was Rs.7,050/-, whereas it is recited in Ex.A.1 as Rs.7,0 00/= and P.Ws.1 and 2 would in their oral evidence also depose that the amount was only Rs.7,050/= and further in consideration that P.W.2 , who is the respondent's sister's husband has a grievance that the property has not been bequeathed on his wife, but on the other two issues, and therefore, he has come forward to speak against the truth in favour of the plaintiff without even making a mention of as to which property has been given in favour of his wife and therefore, the lower appellate court would find the evidence of P.W.2 as a weak piece of evidence. The learned Judge would not also instill confidence in P.W.3, the scribe of Ex.A.1; that this witness having deposed to the effect that only after it has been read out, the respondent signed, but would depose in his evidence that the sale deed was written on 10.7 .1995, whereas, Ex.A.1 agreement dated 10.7.1995 has only been typed and not written in hand, and therefore, finds that this document has not been scribed by P.W.3 and would reject his evidence as false, further posing a question as to why they have not examined the person, who typed it. Moreover, the lower appellate court would find that at the time that Ex.A.1 came into existence, P.W.3 was not present. Therefore, the lower appellate court has got sufficient reasons to reject the evidence of P.W.3 also.

14. The lower appellate court further having brought forth many other facts and circumstances factually for not believing Ex.A.1 sale agreement, would also discuss the legal position in the context of those judgments relied on by parties reported in 1993 II MLJ 144 (by the plaintiff) 100 L.W. 582 (by the plaintiff) and AIR 1998 SC 2216 (by the defendant) and in consideration of these legal aspects also, properly dealing with the subject, the lower appellate court would ultimately arrive at the conclusion to hold that Ex.A.1 sale agreement dated 10.7.1995 was not genuine, but manipulated and made up for the purpose of filing the suit against the defendant and would ultimately allow the appeal filed by the respondent herein, setting aside the judgment and decree passed by the trial court.

15. Now, in consideration of the substantial question of law framed to the effect that Whether the lower appellate court is right in holding that Ex.A.1 agreement of sale is a fraudulent and concocted document and whether the lower appellate court had failed to consider that having established the due execution of Ex.A.1 agreement of sale for a proper and valid consideration, the plaintiff is entitled to the equitable relief of specific performance of the contract?, no doubt, the specific performance is a discretionary and equitable relief and the party, who approaches the Court stating that there is the existence of the fact or non-existence and to seek the relief of specific performance, must come with clean hands. In order to answer the substantial question of law framed above regarding the decision arrived at by the lower appellate court in consideration of Ex.A.l in the context of the evidence placed on record or whether the lower appellate court has failed to consider the valid execution of the said document and whether it could be said that it is only the trial court which has properly appreciated

the evidence so as to arrive at the conclusion to hold that there had been due execution of Ex.A.1 and that it comes to be established in evidence.

16. A simple test, wherein any such deed as claimed by the defendant is not genuine or fraudulently prepared by manipulation of records, to assess whether pertaining to the recitals of the document, the usual and natural aspects which would form part of such agreement is there or whether any artificiality is attached to the same, would help arriving at the valid decision.

17. So far as Ex.A.2 agreement of sale is concerned, it should be said that first of all, it depicts that the defendant is the sole owner of the property mentioned, whereas, it is an admitted fact on the part of even the trial court that the defendant is entitled to only half of the share and the other is belonging to Chinnamuni Chennamma. Secondly, it is the case of the appellant before the trial court that the remaining sale consideration is Rs.7,050/= as per his evidence and that of P.W.2, whereas, the recitals are to the effect that it is only Rs.7,000/= and not Rs.7,050/=. Thirdly, in the ordinary course of business, whenever such agreements are entered into, the advance amount would be a meagre sum and the major sum of sale consideration would be paid only at the time of registration of the sale deed, whereas in this case, from out of the total sale consideration of Rs.43,37 5/=, a fabulous sum of Rs.36,325/= has been paid as advance and the balance consideration that is to be paid at the time of registration was only Rs.7,050/=.

18. There is absolutely no rule or dictum or condition that there cannot be a sale agreement of this nature, but in extreme cases, there could be agreements of sale, wherein the major part of sale consideration is being parted with as advance leaving a minor portion to be paid at the time of registration of the document, but in such event, there would be part performance of the original owner of the property being a party to the agreement parting with the possession of the property so as to have a hold both on fact and in law by operation of Section 53-A of the Transfer of Property Act, which is miserably missing in the case in hand, and therefore, it could only be concluded that artificially, Ex.A.1 agreement has come into existence without any natural flow of successive events towards parties entering into the agreement, and therefore, it could be well said that the plaintiff has not come with clean hands seeking the relief of specific performance. Therefore, coupled with the fact that the lower appellate court has found that there had been manipulations and artificiality attached to the coming into being of Ex.A.1 agreement of sale and it has not been established in law on the part of the plaintiff on whom the onus is heavily imposed and needless to mention that the plaintiff has miserably failed to discharge his liability in the proof of the sale agreement, and therefore, no other conclusion excepting that which has been arrived at by the lower appellate court could be arrived at.

19. The trial court has not properly appreciated the evidence in the manner required in law and mostly it has indulged in doing patch up work wherever the loopholes occur in the case of the plaintiff, which is not

the duty of the Court and in fact, they should have been discredited, in which event, the trial court would have arrived at a different conclusion than the one arrived at to decree the suit as prayed for, so far as the relief of specific performance is concerned.

20. In short, the substantial question of law framed above is answered that the lower appellate court is right in holding that Ex.A.1 agreement of sale is a fraudulent and concocted document and it is not correct on the part of the appellant to say that the lower appellate court has failed to consider that Ex.A.1 agreement of sale has been established on the part of the appellant/plaintiff, and therefore, the only conclusion that this Court could arrive at is to confirm the judgment and decree passed by the lower appellate court, dismissing the above second appeal.

In result,

(i) the above second appeal does not merit acceptance and becomes only liable to be dismissed and is dismissed as such with costs through out;

(ii) the judgment and decree dated 12.2.1999 made in A.S. No.85 of 1998 by the Court of Principal District Judge, Dharmapuri at Krishnagiri, thereby reversing the judgment and decree dated 18.8.1996 made in O.S. No.339 of 1996 by the Court of Subordinate Judge, Hosur, is hereby confirmed.

Index:Yes
Internet:Yes

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